MOTION FILED
MAY 23 1996

No. 95-1720

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GREEN CONSTRUCTION COMPANY AND
THE AMERICAN INSURANCE COMPANY,
Petitioners,

v.

FRED VANKIRK,
WEST VIRGINIA COMMISSIONER OF HIGHWAYS,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Appeals of West Virginia

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN INSURANCE ASSOCIATION AND THE SURETY ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

Craig A. Berrington
Martha L. Perkins
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 828-7100

Ronald D. Maines
(Counsel of Record)
Ronald J. Mann
MAINES & LOEB, PLLC
2300 M Street, N.W.
Suite 900
Washington, D.C. 20037
(202) 223-2817

May 23, 1996 Counsel for *Amici Curiae*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1720

GREEN CONSTRUCTION COMPANY AND
THE AMERICAN INSURANCE COMPANY,

Petitioners,

v.

FRED VANKIRK,
WEST VIRGINIA COMMISSIONER OF HIGHWAYS,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Appeals of West Virginia

MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN INSURANCE ASSOCIATION AND THE SURETY ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

Pursuant to Rule 37.2 of this Court, the American Insurance Association and the Surety Association of America respectfully move for leave to file the attached brief as *amici curiae* in support of the Petition for Writ of *Certiorari*. Counsel for petitioners has consented to the filing of this brief;

counsel for respondent has refused consent, thus necessitating the filing of this motion.

The American Insurance Association (AIA) is a national trade organization representing 270 companies writing property and casualty insurance in every state and jurisdiction. These companies provide 27 percent of all property and casualty insurance underwritten in the United States. AIA companies are affiliated with 79,000 independent insurance agents nationwide. A substantial portion of AIA member companies' business is commercial liability insurance -- the coverage that enables American businesses to provide the goods, services, jobs and investments vital to the country's economic health.

The Surety Association of America (SAA) consists of 662 members that underwrite surety and fidelity bonds. Each of SAA's member companies is licensed to write surety or fidelity bonds in at least one state. SAA is licensed and regulated as either a rating or advisory organization by all states.

The due process issues raised by the petition affect scores of commercial transactions which are part of the daily business life of the Nation. Because of the distinct perspective that AIA and SAA can offer with respect to third-party liability questions, and because our members have a substantial interest in the outcome of this litigation, our participation should assist the Court in determining that the petition should be granted.

Accordingly, AIA and SAA request leave to participate in this case by filing the attached brief.

Respectfully submitted,

Craig A. Berrington
Martha L. Perkins
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 828-7100

Ronald D. Maines
(Counsel of Record)
Ronald J. Mann
MAINES & LOEB, PLLC
2300 M Street, N.W.
Suite 900
Washington, D.C. 20037
(202) 223-2817

May 23, 1996

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

INTRODUCTION 2

REASONS FOR GRANTING THE WRIT 5

I. CONFLICTS OF INTEREST ARE A SERIOUS AND FREQUENTLY RECURRING PROBLEM IN VOUCHING CASES 5

II. DUE PROCESS PROHIBITS PRECLUDING AN INDEMNITOR BY A JUDGMENT OBTAINED AGAINST AN INDEMNITEE WHERE THE INTERESTS OF THE TWO ARE IN CONFLICT 8

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES:

Barber-Greene Co. v. Bruning Co., 357 F.2d 31 (CA8 1966) 14

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 10

Chase Nat. Bank v. City of Norwalk, 291 U.S. 431 (1934) 9

Farm Bureau Mut. Automobile Ins. Co. v. Hammer, 177 F.2d 793 (CA 1949), *cert.denied*, 339 U.S. 914 (1950) 7,14

Ferguson v. Birmingham Fire Ins.Co., 460 P.2d 342 (Or. 1969)(*en banc*) 15

Hansberry v. Lee, 311 U.S. 32 (1940) 8,11

Hoskins v. Hotel Randolph Co., 211 N.W. 423 (Iowa 1926), *cert. denied*, 275 566 (1927) 6

Howell v. Richardson, 544 N.E.2d 878 (Ohio 1989) . . . 15

Humble Oil & Refining Co. v. Philadelphia Ship Maintenance Co., 444 F.2d 727 (CA3 1971) . . . 14

Karas v. Snell, 142 N.E.2d 46 (Ill. 1957) 15

Martin v. Wilks, 490 U.S. 755 (1989) 8,10

TABLE OF AUTHORITIES -- *continued*

Page

Miller v. United States Fidelity & Casualty Co., 197 N.E. 75 (Mass. 1935) 15

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 10

SCAC Transport (USA) Inc. v. Danaos, 845 F.2d 1157 (CA2 1988) 14

Stout v. Grain Dealers Mut. Ins. Co., 307 F.2d 521 (CA4 1962) 14

Universal American Barge Corp. v. J-Chem, Inc., 946 F.d. 1131 (CA5 1991) 7,13,14

Vaksman v. Zurich General Accident & Liability Ins. Co., 94 A.2d. 186 (Pa. Super. Ct. 1953) 16

Washington Gas Light Co. v. District of Columbia, 161 U.S. 316 (1986) 3

Zenith Radio Corp. Hazeltine Research, Inc., 395 U.S. 100 (1969) 9

CONSTITUTION & RULES:

U.S. CONST. amend. XIV § 1 8,9

Fed.R.Civ.P. 14 9

TABLE OF AUTHORITIES -- *continued*

Page

Fed.R.Civ.P. 19 9

Fed.R.Civ.P. 23(a) 12

W.Va.Civ.P. 14 9

W.Va.Civ.P. 19 9

OTHER MATERIALS:

AMERICAN LAW INSTITUTE, RESTATEMENT OF JUDGMENTS (1ST) § 107 (1942) 15

AMERICAN LAW INSTITUTE, RESTATEMENT OF JUDGMENTS (2ND) § 57 (1982) . . . . . *passim*

Ronan E. Degnan & Alan J. Barton, *Vouching to Quality Warranty:Case Law and Commercial Code*, 51 CALIF.L.REV. 471 (1963) 6

1B JAMES WM. MOORE & JO D. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 0.405 (d. ed. 1995) 14

Note, *Development of the Common Law Rule Making a Judgment Conclusive Against Warrantors and Indemnitors*, 34 VA.L.REV. 321 (1948) 2

Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995) 7

18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4452 (1981) . . . . . *passim*

UNIFORM COMMERCIAL CODE § 2-607(5)(a) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1720

GREEN CONSTRUCTION COMPANY AND
THE AMERICAN INSURANCE COMPANY,

Petitioners,

v.

FRED VANKIRK,
WEST VIRGINIA COMMISSIONER OF HIGHWAYS,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Appeals of West Virginia

BRIEF OF THE AMERICAN INSURANCE ASSOCIATION AND THE SURETY ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

INTERESTS OF *AMICI CURIAE*

The interests of *amici* are set out fully in the preceding motion. The motion indicates that petitioners, but not respondent, have consented to the filing of this brief. A letter of consent from petitioners has been lodged with the Clerk.

INTRODUCTION

The prompt resolution of the due process issues raised by the petition is a matter of crucial importance, not just to the insurance and surety industries, but to industries from a variety of commercial sectors in which the practice of vouching is commonly employed. Vouching can occur in any situation in which one party has an obligation to indemnify another. The classic vouching transaction has three parties: A plaintiff asserting a substantive claim; a defendant/indemnitee against whom the plaintiff is asserting the claim; and an indemnitor alleged to be liable to the defendant under the plaintiff's claim.

Vouching is the practice by which the defendant/indemnitee notifies the indemnitor of the defendant's view that the plaintiff's claim is covered by the indemnity or warranty obligation of the indemnitor. By the standards of modern civil procedure, which include well-defined opportunities for impleader and joinder, vouching is oddly anachronistic because it subjects a *nonparty* to the judgment of a court. The circumstances in which that result can be enforced without violating due process have sharply divided lower courts.

A. Vouching apparently originated in disputes about title to real and personal property. If a purchaser of land found its title questioned by a third party, the purchaser would "vouch" its seller to assume defense of the lawsuit. If the seller (warrantor) did not appear to defend, the seller generally would be bound by a judgment that the third party (plaintiff) obtained against the purchaser (warrantee). *See* Note, *Development of the Common Law Rule Making a Judgment Conclusive Against Warrantors and Indemnitors*, 34 VA. L. REV. 321, 322-23 (1948)

(tracing that practice to a seventh century statute of King Hlothhaere of Kent).

The traditional vouching rules have been carried forward into modern practice with only minor adjustments. *See, e.g.*, 2 AMERICAN LAW INSTITUTE, RESTATEMENT OF JUDGMENTS (2D) § 57, at 76-77 (1982) (restating modern principles of vouching); U.C.C. § 2-607(5)(a) (codifying procedures under which purchasers of personal property vouch-in sellers that gave warranties at the time of the sale). This Court's only pronouncement on the subject confirmed the traditional rule articulated above. *Washington Gas Light Co.* v. *District of Columbia*, 161 U.S. 316 (1896).[1]

Through the centuries, the practice of vouching has spread from the relatively narrow setting in which it originated to a variety of contexts.[2] Thus, it is now common for defendants to use vouching in any situation where a third party has an obligation to indemnify, whether the obligation to indemnify arises from warranties made by the third parties or from a contractual indemnity obligation.

B. Conflicts of interest can, and frequently do, arise in any context in which vouching is utilized. Particularly

---

1 As leading commentators have recognized, the *Washington Gaslight* case did not examine the issues presented here. 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4452, at 441 n.2 (1981).

2 *See* 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4452, at 440 (discussing how "[v]ouching practice has been extended, in an uncertain fashion, to a wide variety of relationships").

common opportunities for conflicts involve disputes between manufacturers and retail sellers of personal property, disputes between warrantors and warrantees, and disputes between insurers and insureds. The breadth of commercial transactions in which conflicts of interest underlie third-party liability underscores the importance of this issue -- and highlights the gravity of the offense to due process which such conflicts create.

A core tenet of due process is that those who are not parties to an action generally are not to be bound by the judgment in that action. This rule holds even if the nonparty has notice of the action and understands that the action raises issues of interest to the nonparty. To bind the nonparty to a judgment, one of the parties ordinarily must have joined the nonparty through available procedural devices.

This Court has recognized a variety of exceptions to that rule, but they involve circumstances where the relationship between party and nonparty is sufficient to justify an inference that the party adequately would represent the interests of the nonparty. None of these exceptions can apply in cases, like this one, that present significant conflict between the voucher and the vouchee.

In such a case, the plaintiff can impose liability on the defendant for two logically separate reasons. If one reason is advanced, the plaintiff's recovery will fall within the scope of the indemnity; if another is advanced, the recovery will fall outside the scope of the indemnity. Thus, the defendant has an interest in ensuring that the reason advanced by the plaintiff is one that gives rise to the indemnity, while the indemnitor has a contrary interest. For example, a defendant may offer to settle a case on a theory that compels the indemnity. Or a defendant

may put on a weaker defense anticipating the ultimate liability of the vouchee/indemnitor. In these situations -- and any number of others that are easily imagined -- the defendant cannot fairly represent the interests of the indemnitor. As recognized by several courts of appeals and the *Restatement of Judgments (2d)*, *post* at 12-15, this type of dual-allegation scenario is the classic case in which preclusion of the vouchee/indemnitor is inappropriate.

REASONS FOR GRANTING THE WRIT

I. CONFLICTS OF INTEREST ARE A SERIOUS AND FREQUENTLY RECURRING PROBLEM IN VOUCHING CASES.

As noted, the most persistent problem with vouching has been the difficulties that arise when the indemnitor and indemnitee have conflicting interests in the resolution of the plaintiff's underlying action against the defendant/indemnitee. The severity of that problem is magnified because of the multiplicity of areas where conflicts materialize. Three examples illustrate the diversity of cases in which the problem occurs.

One of the most common factual settings for vouching (closely akin to the original use of the doctrine) involves claims related to defects in personal property. For example, a leading vouching case is an early products-liability dispute arising out of an elevator accident. The owner of the elevator vouched-in the manufacturer (Otis Elevator Co.) to defend the ensuing litigation. The conflict of interest between the owner and the manufacturer became clear when Otis thoroughly defended against allegations that it had been negligent in designing the elevator. Otis did not, however, present any substan-

tial defense against claims that the owner had negligently repaired and serviced the elevator. Thus, Otis's defense served to protect its interests, at the expense of the interests of the owner (who would have been liable for damages caused by its own negligence). *Hoskins* v. *Hotel Randolph Co.*, 211 N.W. 423 (Iowa 1926), *cert. denied*, 275 U.S. 566 (1927); *see* Ronan E. Degnan & Alan J. Barton, *Vouching to Quality Warranty: Case Law and Commercial Code*, 51 CALIF. L. REV. 471, 490-92 (1963) (discussing the conflicting interests of the manufacturer in the *Hoskins* case).

Conflicts of interest also arise frequently in cases where accidents occur in situations that arguably implicate express or implied warranties. One prominent example arose out of the mishandling of a ship's cargo that led to the cargo catching fire during the ship's voyage. The fire resulted in a claim by the owner of the cargo (an agency of the Egyptian government) against the owner of the barge on which the fire occurred. After the owner was held liable for the damage, it sued the company that had fumigated the cargo before the voyage, claiming that the fumigator was liable for the damages based on an implied marine warranty of workmanlike performance. The conflict arose in that case because the cause of the fire was unclear. It could have been caused either by the negligence of the owner in operating the barge or by the negligence of the fumigator. When the owner defended the lawsuit, it had a strong incentive to defend against the claim that it had acted negligently (for which it would be directly liable), but a diminished incentive to defend against claims that the fumigation had been negligent (because the fumigator would have to indemnify the owner for any damages assessed on that basis). That conflict led the Fifth Circuit to hold that the fumigator was not bound by a judgment against the

owner. *See Universal American Barge Corp.* v. *J-Chem, Inc.*, 946 F.2d 1131, 1134-35, 1139-42 (CA5 1991).

The third example is the most typical in current commercial litigation: Liability insurance disputes. One well-known case in this area arose when a driver intentionally drove his truck into another car; the action killed one of the car's occupants and injured two others. The insurance policy for the truck driver did not extend to damages caused by assault and battery. Thus, the insurance company's interests were advanced by an argument that the incident involved an assault and battery, for which the insurer would not be responsible. The interests of the insured, on the other hand, called for an argument that the incident was caused by conduct that was only negligent. In light of that conflict, the Fourth Circuit held that the insurer was not bound by judgments that the injured parties obtained against the tortfeasor/defendant. *See Farm Bureau Mut. Automobile Ins. Co.* v. *Hammer*, 177 F.2d 793, 798-801 (CA4 1949), *cert. denied*, 339 U.S. 914 (1950).[3]

The spectrum of commercial settings in which conflicts of interest bear upon nonparty liability demonstrates the pervasiveness of the problem raised by this issue, and commends it to the Court's review. As shown in Section II, the issue requires the Court's review because a vital principle of constitutional law is in play: These quite ordinary commercial activities routinely violate the borders of due process.

---

3 For an illuminating list of examples of conflicting interests of insurers and their insureds, see Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 258-60 (1995).

II. DUE PROCESS PROHIBITS PRECLUDING AN INDEMNITOR BY A JUDGMENT OBTAINED AGAINST AN INDEMNITEE WHERE THE INTERESTS OF THE TWO ARE IN CONFLICT.

The decision of the Supreme Court of Appeals of West Virginia violates the Due Process Clause of the Fourteenth Amendment because it contravenes fundamental precepts of civil procedure. The Due Process Clause does not permit the States to deprive a person of property on the basis of a judgment in a proceeding to which the person was not a party, unless that person's interests were represented in that proceeding.

A. "The basic premise of preclusion is that parties to a prior action are bound and nonparties are not bound." 18 CHARLES ALAN WRIGHT ET AL., *supra*, § 4449, at 411. Notice of an action is not enough to bind somebody to the judgment in a case to which he is not a party. Rather, "[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." *Martin* v. *Wilks*, 490 U.S. 755, 765 (1989). With very limited exceptions (which we discuss below), this Court repeatedly has relied on that axiom as the foundation of its jurisprudence on the effects of judgments. Thus, as the Court explained in *Hansberry* v. *Lee*, 311 U.S. 32, 40-41 (1940) (citations omitted):

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. A judgment rendered in such

> circumstances is not entitled to the full faith and credit which the Constitution and statutes of the United States prescribe, and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requir[e].

See also Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) ("It is elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process.").

The "process" that is "due" under Section 1 of the Fourteenth Amendment is formal service and joinder to a lawsuit, not informal written or telephonic notice. As Justice Brandeis put it:

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. * * * Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.

Chase Nat. Bank v. *City of Norwalk*, 291 U.S. 431, 441 (1934).

If a party already in litigation wants another to be bound by a judgment in that litigation, the litigating party has a clear and simple remedy: Bring the outsider into the existing litigation. *See* FED. R. CIV. P. 14, 19; W. VA. CIV. P. 14, 19. That approach is desirable not only because of basic principles of fairness, but also because of the relative positions of the parties. It is more efficient to require parties to a lawsuit to join third parties

who are needed to make relief effective, than to obligate parties who are not joined to judge whether they should intervene:

> The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief should be granted. It makes more sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit.

Wilks, 490 U.S. at 765. If the litigating party fails to join the outside party -- and thus allows the outsider to stay aloof from the litigation -- the litigating party should not be surprised when the outsider calls for its own day in court rather than accepting a judgment rendered in litigation in which it did not participate.

Indeed, a judgment generally has no effect on a nonparty even as to issues actually decided in the case that led to the judgment:

> Some litigants -- those who never appeared in a prior action -- may not be collaterally estopped without litigating the issue. * * * Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1971); *see Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.").

B. The Court has articulated certain limited exceptions to this rule, cases in which persons are bound by judgments even though they are not parties to the cases in which those judgments are rendered. In *none* of those cases, however, has the Court countenanced preclusion of an absent non-consenting party without a concurrence of interest between the absent party and a party to the litigation -- for only in that instance could it be said that the non-consenting party's interests were fairly represented.[4]

The Court's attention to the relationship between the parties to a case and nonparties to be bound by a judgment is most evident in the class-action context. There, the Court expressly has accepted the "familiar doctrine of the federal courts that members of a class not present to the litigation may be bound by the judgment." *Hansberry*, 311 U.S. at 42-43. The Court firmly limited that rule, however, to cases in which the absent parties

> are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason [the present parties legally are entitled to represent the absent parties].

Hansberry, 311 U.S. at 43. That formulation allows courts considerable flexibility to structure class actions, but it plainly excludes binding absent class members to judgments in cases where their interests were represented

---

4 For a general summary of the exceptions articulated by the Court to date, *see* 18 CHARLES ALAN WRIGHT ET AL., *supra*, § 4454.

only by parties with conflicting interests. *See*, *e.g.*, FED. R. CIV. P. 23(a) (prohibiting class action unless "the claims or defenses of the representative parties are typical of the claims or defenses of the class, and * * * the representative parties will fairly and adequately protect the interests of the class"); 1 RESTATEMENT OF JUDGMENTS (2D), *supra*, § 42(1)(d), at 406 (stating that a class member is not precluded by a judgment against a class representative where "there was such a substantial divergence of interest between [the representative] and the members of the class * * * that he could not fairly represent them").

C. Applying these principles to this context illustrates the error of the decision below. As the petition explains, a serious conflict of interest indisputably existed between Green (the indemnitor) and the State (the indemnitee). The plaintiff Greer could have prevailed against the State on either of two theories: One would have required indemnification by Green; the other would have barred indemnification. *See* Pet. 5-7, 18-19. Accordingly, the State could not fairly represent the interests of Green. Because the State could not fairly represent Green's interests, and because Green was not a party to the lawsuit, to deem Green precluded on the issues as to which the State had conflicting interests would violate due process.

Contrary to the impression created by the opinion of the court below, the analysis outlined above represents the mainstream, dominant course of authority on the question. For example, the *Restatement of Judgments (2d)* includes a separate section (§57) devoted to a codification of vouching principles. Subsection (2) dictates unambiguously that indemnitors such as Green should *not* be precluded by the judgment in the litigation between the plaintiff and the State:

> (2) If there is a conflict of interest between the indemnitor and the indemnitee, so that the indemnitor could not properly have assumed the defense of the indemnitee, a judgment for the injured person precludes the indemnitor only with respect to issues determined in that action as to which:
>
> (a) there was no conflict of interest between the indemnitee and the indemnitor; and
>
> (b) the indemnitee conducted a defense with due diligence and reasonable prudence.

2 RESTATEMENT OF JUDGMENTS (2D), *supra*, § 57(2), at 77.

Comment c and Illustration 4 to § 57 make clear that the provision was designed for just such a case as this. The comment explains that a conflict commonly "occurs when the injured party's claim may be upheld on different grounds, one of which is within the indemnity obligation and the other of which is not." *Id.* at 81. The commentary goes on to provide an illustration involving a defective ladder. The purchaser sues the seller claiming (a) that the ladder was defective; and (b) that the seller promised him that the ladder's strength was adequate. The manufacturer would be liable for damages based on claim (a), but not for damages based on claim (b). Accordingly, the Illustration explains, the manufacturer would not be bound by the determination of the seller's liability to the purchaser. *Id.* at 82 (Illustration 4).

The same analysis appears in the two modern court of appeals decisions addressing this question, both of which expressly approve the *Restatement*'s formulation. *See Universal American Barge Corp.* v. *J-Chem, Inc.*, 946 F.2d 1131, 1139-41 (CA5 1991) (*per* Reavley, J.)

(recognizing general validity of vouching, but adopting the *Restatement*'s view that "estoppel [by vouching] precludes only those issues in the indemnity action as to which * * * there was no conflict of interest between the indemnitee and the indemnitor"); *SCAC Transport (USA) Inc.* v. *Danaos*, 845 F.2d 1157, 1162 (CA2 1988) ("Where vouching is used but the indemnitor declines to assume the defense of an action, the indemnitor is bound by the result only when its interests have been adequately represented in the original action by the indemnitee.") (citing 2 RESTATEMENT OF JUDGMENTS (2D), *supra*, §57).[5]

Several older decisions of the courts of appeals have reached a similar conclusion. *See Humble Oil & Refining Co.* v. *Philadelphia Ship Maintenance Co.*, 444 F.2d 727, 735 (CA3 1971) (judgment against indemnitee not preclusive as to indemnitor if case presents charges on which indemnitor would be liable and charges on which indemnitor would not be liable); *Farm Bureau Mut. Automobile Ins. Co.* v. *Hammer*, 177 F.2d 793, 799 (CA4 1949) (vouched insurer precluded only on issues where its interests were "identical" to those of the insured), *cert. denied*, 339 U.S. 914 (1950); *Stout v. Grain Dealers Mut. Ins.Co.*, 307 F.2d 521, 524-25 (CA4 1962) (insurer has no duty to defend if it is "not possible for the insurer to defend the insured and at the same time protect its own interests"); *Barber-Greene Co.* v. *Bruning Co.*, 357 F.2d 31, 35 (CA8 1966) (*per* Blackmun, J.) (indemnitee not

---

5 *See also* 18 CHARLES ALAN WRIGHT ET AL., *supra*, § 4452, at 442-43 (favorably describing trend limiting preclusion by vouching in the presence of conflicts of interest). The other leading treatise offers no opinion on the question, but simply summarizes the provisions of the *Restatement (2d)* and the decision of the Fifth Circuit in *Universal American Barge*. 1B JAMES WM. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 0.405[9], at III-66 to III-68 (2d ed. 1995).

precluded when it failed to take over defense of case in which it "could not consistently defend both [the indemnitor]'s interests and its own"); *see also Ferguson* v. *Birmingham Fire Ins. Co.*, 460 P.2d 342, 348 (Or. 1969) (*en banc*) (following CA4's decision in *Hammer* and limiting preclusion to issues "where the interests of the insurer and insured in defending the original action are identical -- not where there is a conflict of interests"). *But see Howell* v. *Richardson*, 544 N.E.2d 878, 881 (Ohio 1989) ("[W]hether seized or not, the opportunity to litigate in the original action will preclude relitigation of liability in the supplemental proceeding.").

Finally, a similar approach is reflected in several older state-court decisions, which followed the formulation of the *Restatement of Judgments (1st)*. Under that approach, "[t]he judgment against the indemnitee does not decide issues as to the existence and extent of the duty to indemnify. Thus, in a subsequent action the indemnitor may show that the circumstances under which he is required to give indemnity do not exist." AMERICAN LAW INSTITUTE, RESTATEMENT OF JUDGMENTS §107 comment g, at 517 (1942). That view produces results much like the current majority rule because it leaves the vouchee free to raise policy exclusions and defenses in later litigation between the voucher and vouchee.[6]

---

6 *See Karas* v. *Snell*, 142 N.E.2d 46, 55 (Ill. 1957) (holding that decision in litigation between plaintiff and insured is limited to issues "necessarily included in the adjudication" when "the interests of the voucher and the vo[u]chee are distinct and hostile"); *Miller* v. *United States Fidelity & Casualty Co.*, 197 N.E. 75, 77 (Mass. 1935) (holding that an insurer "is bound by the results of th[e] action [between the plaintiff and the insured] as to all matters therein decided which are material to recovery by the insured [but explaining that] "this does not mean that the insurer is barred from setting up in the action against it any matter constituting a defense and not already determined in the

* * *

In sum, the decision of the Supreme Court of Appeals of West Virginia erroneously resolved an important and frequently litigated question that affects a spectrum of commercial arrangements. The lower court's answer to that question is inconsistent with the majority of the decisions of other courts and inconsistent with the fundamental principles of due process articulated by this Court.

---

original action"); *Vaksman* v. *Zurich General Accident & Liability Ins. Co.*, 94 A.2d 186, 189 (Pa. Super. Ct. 1953).

CONCLUSION

The Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

Craig A. Berrington
Martha L. Perkins
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 828-7100

Ronald D. Maines
(Counsel of Record)
Ronald J. Mann
MAINES & LOEB, PLLC
2300 M Street, N.W.
Suite 900
Washington, D.C. 20037
(202) 223-2817

May 23, 1996